UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01

FLIGHT SERVICES & SYSTEMS, INC.	)	
	)	
and	)	CASE 01-CA-183911
	)	01-CA-189755
SERVICE EMPLOYEES INTERNATIONAL	)	01-CA-194600
UNION LOCAL 32BJ	)	
	)	

RESPONDENT, FLIGHT SERVICES & SYSTEMS, INC.'s
REPLY TO CHARGING PARTY, SEIU'S OPPOSITION TO ITS
MOTION FOR SUMMARY JUDGMENT/ TO DISMISS

Now comes the Respondent, Flight Services and Systems, Inc. ("FSS"), by and through its undersigned counsel and, pursuant to Section 102.24 (c) of the Rules of the National Labor Relations Board ("the Board"), respectfully submits its following reply to the SEIU Local 32 BJ's ("SEIU") opposition to its motion for summary judgment/to dismiss. Upon consideration of the relevant evidentiary materials properly before the Board, and the arguments of law presented in both FSS's original filings and this brief, it is again respectfully requested that the Board find that it lacks jurisdiction and dismisses the complaint or, in the alternative, refers the question of jurisdiction to the National Mediation Board ("NMB") for an opinion on the question of jurisdiction.

I. REPLY RE: DETERMINATION OF THE SUMARY JUDGMENT MOTION, AND THE ABSENCE OF ISSUES OF FACT.

The SEIU, in its brief, pays lip service to the established legal principle that summary judgment motions before the Board are to be determined, to the extent possible, in conformity with F.R. Civ. P. 56. It then goes on to fail to dispute facts established by authenticated documents and affidavits made upon personal knowledge with any relevant, probative evidence.

As did the General Counsel, the SEIU has attached an unauthenticated contract with the Massachusetts Port Authority to its brief, in violation of Rule 56 (e). [SEIU Ex. 5] If that could be considered at all, the insurance coverage certificate attached and produced by the SEIU shows that FSS's services are nationwide, and not limited to Logan Airport. They should, as the NMB has previously determined ,[1] be considered in support of viewing FSS as a single, nationwide system. Nevertheless, this document is, respectfully, objected to, and FSS moves to strike it from the record.

While the SEIU attaches two affidavits from a 2008 case involving issues of minimum wage, this is simply not probative of current conditions. The assertion is made, without any support whatsoever, that in a 2008 case, not involving a dispute over NLRB jurisdiction, but involving three skycaps and the application of minimum wage laws, FSS took the approach that it was an independent contractor. This is utterly irrelevant, since every entity under RLA jurisdiction which is not actually a carrier, but which is "indirectly controlled" by a carrier would be an independent contractor under a common law test. This, even if proved, does not affect the analysis under relevant NMB and NLRB precedent.

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[1] *International Total Services,* 20 NMB 537 (1993).

The only evidence properly before the Board on the issues raised by the SEIU are the affidavits of Armstrong and Weitzel, and the current contract with Jet Blue authenticated therein. Considering this relevant, recent proof, there is no issue of fact to be decided.

In addition, the 2013 affidavits from two employees actually demonstrate control over the actions of the employees by the carriers. At para. 7 of Rene Iraheta's affidavit, the worker acknowledged having to follow the instructions of a JetBlue (the carrier) employee about serving wheelchair customers. At para. 11, it is acknowledged that JetBlue equipment (wheelchairs) are used. In the 2013 affidavit of Gerala Germain, at para.7, she states that she was trained on Jetblue's policies. [SEIU Ex.1 and 2] These are indicia of control by the carrier over FSS's employees.

The settlement agreement attached as SEIU Ex.6 is not sworn to or authenticated in any way. No affidavits, declarations, or other sworn proof enumerated in Civ. R. 56, or in the Board decisions or cases applying summary judgment procedures, which support it as required, are attached. It is asserted that this unsworn, unauthenticated copy of a settlement agreement between the Board and FSS from a 2015 dispute demonstrates that FSS has somehow conceded the jurisdictional issue. Even a cursory reading of that settlement (if it can be considered, which it cannot) shows that, while General Counsel reserved the right to use any evidence developed in connection with that charge in later charges, FSS also reserved the right to raise any and all defenses it has in future charges, such as the ones at bar. No concession of jurisdiction has been made by FSS.

Finally, like the General Counsel, the SEIU makes an assertion that FSS has some natural advantage in adducing evidence in these proceedings regarding its operations. Again, this is completely disingenuous, and ignores the enormous power, including subpoena power, that

General Counsel enjoys during the investigatory phase of a charge, which General Counsel exercised at every turn. It also appears to be false since, in the General Counsel's brief, the repeated assertion is made that it has evidence, which it will produce at trial, but just chooses to not produce at this time. Since the General Counsel and the SEIU are arraigned on the same side in this dispute, the union's argument that it does not have access to the information the General Counsel claims to possess rings hollow. And, in a summary judgment case, the failure to actually produce the evidence necessary to demonstrate an issue for trial is fatal to that objection to the motion. *See, Western Electric, supra*, at 624 ("The General Counsel, having failed to controvert these additional facts, has not met the burden imposed upon an adverse party by the aforementioned rule.").

The SEIU has not factually disputed FSS' motion, or filed any relevant, probative materials to demonstrate that there is a genuine issue of material fact for trial. The motion must be granted.

II. REPLY RE: THE ITS CASES

In the *International Total Services* cases, 9 NMB 392 (1982), 11 NMB 67 (1983), 16 NMB 44 (1988), 20 NMB 537 (1993), 24 NMB 18 (1996), and 26 NMB 72 (1998) the National Mediation Board ("NMB"), looking at ITS's operational arm, found, in each case, at airports throughout the United States, that ITS is subject to RLA jurisdiction. Two undisputed facts are present before this Board: (1) FSS is ITS's operational arm at Boston Logan airport; and (2) the operations of FSS are substantially the same as those previously ruled upon by the NMB. This can be seen by looking at the facts in 11 NMB 67 (1983) which involved security, maintenance and janitorial workers; 16 NMB 44 (1988), which involved skycaps and baggage handlers; and, most importantly, 20 NMB 537 (1993) in which a case involving skycaps at Logan Airport was

found to be under NMB jurisdiction. To suggest that this consistent run of cases has no bearing on this summary judgment motion, or does not compel the legal conclusion that FSS is subject to RLA jurisdiction, flies in the face of this long-standing precedent, which General Counsel and its SEIU ally seek to reverse.

The SEIU argues that evidence from FSS operations at other airports is not relevant, and cites to several *Air Services* and *Huntleigh USA Corp.* cases to show that operations at some airports may be under the NLRA, while some are under the RLA.[2] However: what is missing from this faulty analysis is the fact that, in *International Total* Services, 20 NMB 537 (1993) the NMB expressly found that ITS's entire airline services division (i.e., FSS), nationwide, was one system subject to the RLA.[3] Further, this very decision was made concerning its operations at Logan Airport.

The baseless assertion made by the SEIU that there has been no NMB determination applicable to Logan Airport is, as a matter of law, without foundation. Jurisdiction under the NLRA is, also as a matter of law, lacking here.

III. REPLY RE: THE *ABM ON-SITE SERVICES – WEST, INC.* DECISION

Like the General Counsel, the SEIU relies on post-2013 NMB and NLRB decisions to support the notion that there is jurisdiction in the NLRB here. A ferocious attack on the decision of the D.C. Circuit in *ABM Onsite Servs.-West, Inc. v NLRB,* 849 F.3d 1137 (D.C. Cir. 2017),is mounted here, mostly on the basis that the Court did not overrule or vacate post-2013 decisions of the NMB and NLRB, which applied the more restrictive test of a carrier exercising a substantial degree of control over firing and discipline of a company's employees before it would

[2] 39 NMB 455(2012); 38 NMB 113(2011); 40 NMB 130 (2013); 14 NMB 149 (1987); 29 NMB 121 (2001)
[3] *See, also,* 26 NMB 72.

find that company subject to the RLA. *Id.* at 1144. The Court did, however, expressly find, at 1142:

> "This case turns on the fundamental principle that an agency may not act in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). The NLRB has violated that cardinal rule here by applying a new test to determine whether the RLA applies, without explaining its reasons for doing so. Because an agency's unexplained departure from precedent is arbitrary and capricious, we must vacate the Board's order." (emphasis added)

Thus, the post-2013 decisions, all of which are relied upon by the SEIU in its brief in opposition, and all of which apply the unexplained standard which the D.C. Circuit found to "arbitrary and capricious" cannot be relied upon. True, *ABM Onsite Servs.-West, Inc.,* did not expressly overrule those decisions; however, unless and until a reasoned basis for applying the post-2013 rationale is supplied by either the NMB or the NLRB, to rely upon them is to invite reversal, as happened in that case.

IV. REPLY RE: REFERRAL TO THE NMB

Finally, like the General Counsel, the SEIU sets up a "straw man" argument purportedly made by FSS: that referral to the NMB for an opinion is mandated. This falsely suggests that FSS has asserted that the Board lacks the legal ability to determine jurisdiction. This is not what is asserted.The issue is whether or not the Board should, in this case, make that determination, or whether it should refer the matter to the NMB for an opinion.

In *United Parcel Service*, 318 NLRB 778, 780 (1995), aff'd *sub nom. United Parcel Serv., Inc. v. NLRB,* 92 F.3d 1221, (D.C. Cir. 1996), the Board held:

> "Nevertheless, we find that the general policy of referral which the Board has followed for nearly 40 years has important policy advantages. First, the practice enables the Board to obtain the NMB's expertise on jurisdictional matters most familiar to it. Second, the practice minimizes the possibility of conflicting agency determinations.

> Despite this general practice of referral, there have been exceptions in which the Board has found referral unnecessary or unjustified. The Board has not referred to the NMB cases presenting jurisdictional claims in factual situations similar to those where the NMB has previously declined jurisdiction. The Board has also not referred to the NMB cases which involve employees of an air carrier who are in no way engaged in activity involving airline transportation functions and whose work normally would be covered by the NLRA.
>
> Finally, and most significantly in the present case, the Board has also declined to refer RLA claims to the NMB for an initial opinion in cases where the Board has previously exercised uncontested jurisdiction over the employer. " (emphasis added).

Here, none of the exceptions to the "general policy of referral" to the NMB are present. In prior determinations involving ITS, of which FSS is the operational arm, the NMB has exercised, and not declined, jurisdiction. As demonstrated by those cases, the activities carried on by FSS employees are those of air carriers. Finally, the NLRB has not, previously, exercised uncontested jurisdiction over FSS. None of the exceptions apply here, and the Board should refer this matter to the NMB for an opinion. This is even more true in the instant case, where the legal standard for invoking RLA jurisdiction is in flux, and this Board has already decided, in 2017, to refer to the NMB for an opinion. *See,* Referral letter in the *ABM Onsite Services – West, Inc.* case, dated May 18, 2017, attached hereto, in which the Board has already exercised its discretion to refer the matter to the NMB for an opinion. The Board should do so here, too.

CONCLUSION

For all of the foregoing reasons, and for the reasons originally set forth in support of its motion for summary judgment/to dismiss, Respondent Flight Services and Systems, Inc. again respectfully requests that its motion be granted.

Respectfully submitted,

/s/ Timothy A. Marcovy
TIMOTHY A. MARCOVY

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CERTIFICATE OF SERVICE

Copies of Flight Services & Systems, Inc.s Reply to the SEIU's Opposition to its Motion for Summary Judgment/To Dismiss, and of the were served electronically, by email, upon Alejandra Hung and Gene Switzer, counsel for the General Counsel, Region One, at Alejandra.Hung@nlrb.gov and at Gene.Switzer@nlrb.gov, and on Ingrid Inava, Counsel for SEIU, Local 32 BJ, at inava@seiu32bj.org, this 25th day of September, 2017.

/s/ Timothy A. Marcovy
TIMOTHY A. MARCOVY

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1015 Half St., S.E.
Washington, D.C. 20570-0001

May 18, 2017

Ms. Mary L. Johnson
General Counsel
National Mediation Board
1301 K Street, NW -- Suite 250 East
Washington, DC 20005-7011

Re: ABM Onsite Services - West, Inc.
Cases 19-RC-144377, 19-CA-153164

Dear Ms. Johnson:

The above-captioned proceeding is currently pending before the National Labor Relations Board. In the underlying representation proceeding, the NLRB, over then-Member Miscimarra's dissent, concluded that, under recent National Mediation Board decisions, the Employer is not subject to the Railway Labor Act. In *ABM Onsite Services – West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017), the court remanded the case to the Board, holding that the NMB cases on which the NLRB's representational decision relied represented a departure from longstanding NMB precedent.

Consistent with the court's opinion, the Board respectfully requests that you review the record and provide the NLRB with your opinion as to whether the NMB has jurisdiction over the Employer. In doing so, we request that the NMB address the concerns expressed in the court's decision.

The issues are set forth in the various attachments, including the D.C. Circuit Court's opinion, the Regional Director's Decision and Direction of Election in the underlying representation case, and the transcripts and exhibits from the hearings held in the NLRB representation proceeding. Should you require further information about the record in the representation proceeding, please contact Mr. Ronald K. Hooks at (206) 220-6310.

The Board would appreciate your opinion in a form appropriate for citation or quotation in any decision the NLRB may subsequently issue. It is respectfully requested that the enclosed formal documents be returned with your opinion.

Sincerely,

Susan Leverone
Associate Solicitor

Enclosures

cc: Mr. Gary Shinners
Mr. Ronald K. Hooks